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Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

VICTORIA M. VOGEL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

PETITIONER'S REPLY BRIEF

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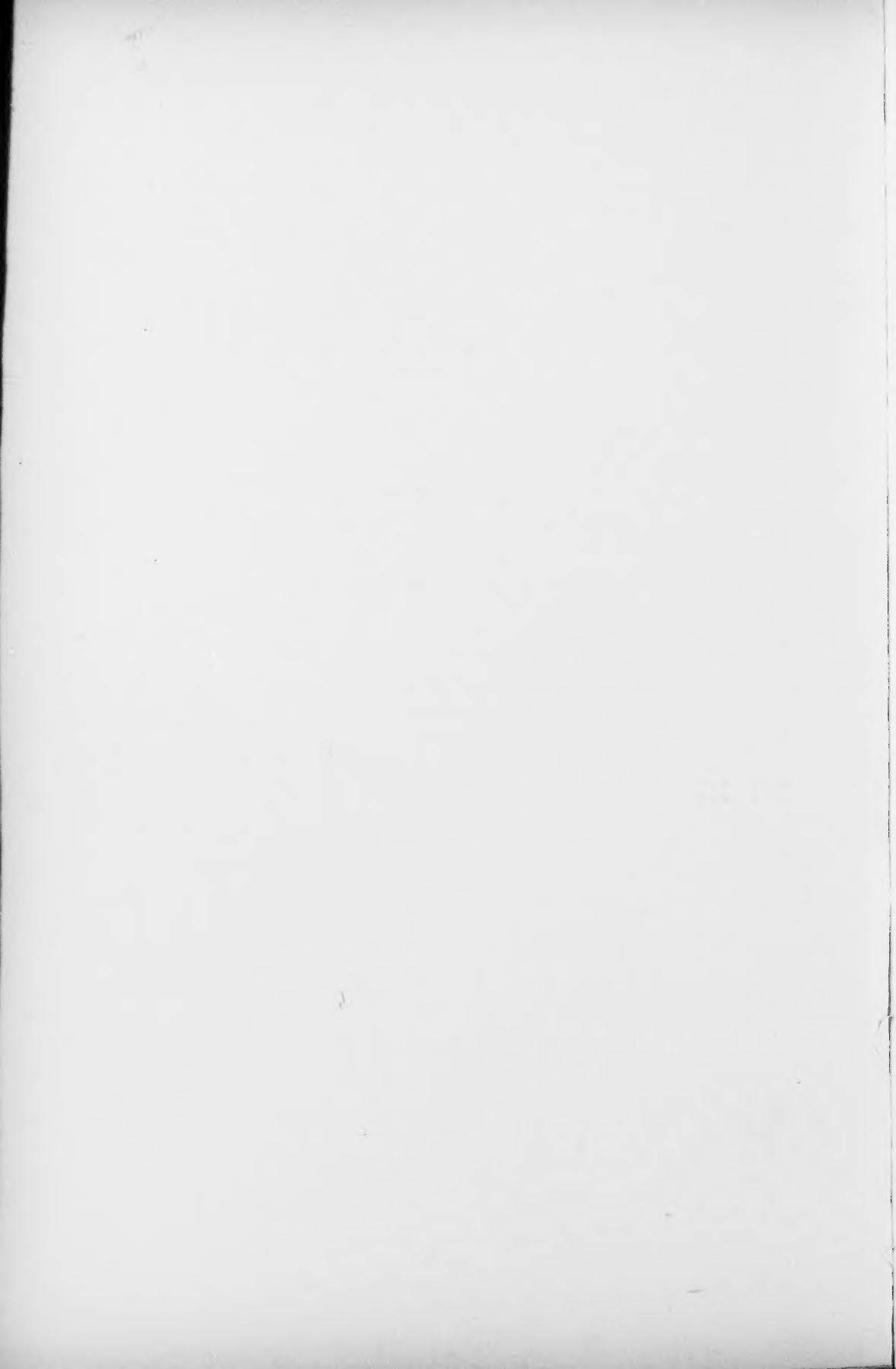


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ARGUMENT

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The decision of the Court of Appeals rests on two
basic propositions:

a. that military personnel actions such as
Dr. Vogel's loss of hospital credentials and
passover for promotion to Captain are non-
justiciable; and

b. that these actions are not properly reviewed in the Claims Court in the context of a Tucker Act case for Additional Special Pay ("ASP"), even though that pay was denied on grounds that are inextricably intertwined with both the loss of credentials and the pass-over.

The Government's Opposition does justice to neither of these issues.

1. The Petition explains why actions such as those complained of by Dr. Voge are justiciable. Military passovers have long been understood to be subject to judicial review, as witness the cases this Court cited with approval in *Chappell v. Wallace*, 462 U.S. 296, 303 (1983).¹ Similarly, improper revocation of hospital privileges is today widely recognized as actionable in the civilian community. Nothing in the Opposition suggests that the same type of action against a physician suddenly becomes unfit for judicial scrutiny when the hospital happens to be run by the military. If anything, the detailed procedural regulations laid down in the Navy's *Fair Hearing Plan*, Pet. at 4-9, make judicial review of military decredentiaing more appropriate than in civilian settings where hospital decisionmaking may be less structured.

¹ Footnote 4 of the Opposition reflects an understanding of the amenability of correction board decisions to judicial review under the Administrative Procedure Act ("APA") which conflicts with *Chappell* and should not be permitted to enter the canon of military personnel law without examination. The extent to which a correction board decision that was channeled only by the "error" or "injustice" standards of 10 U.S.C. § 1552(a) (1982) is subject to APA review is not presented by this case, since here there were three *other* clearly adequate sources of "law to apply." Pet. at 21-22.

2. But there is no need to rest simply on logic, for Congress—in a statute to which the Government adverted in the Court of Appeals (but to which its Opposition makes no reference)—unmistakably revealed its understanding that decredentiaing such as that suffered by this Navy doctor is subject to judicial review. Section 705(a) of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3902, provides that medical quality assurance records of the Department of Defense may be disclosed, *inter alia*,

[t]o an administrative or *judicial* proceeding commenced by a present or former Department of Defense health care provider concerning the termination, suspension, or limitation of clinical privileges of such health care provider. 10 U.S.C.A. § 1102(c)(1)(B) (West Supp. 1988) (emphasis added).

Whatever the proper rule may be with respect to other kinds of military personnel actions, therefore, Congress has expressly recognized that actions such as that taken against Dr. Voge's hospital privileges are a proper subject of judicial review. The interest vindicated by this provision is that of affording "[b]asic fairness" to "the affected practitioner." Woodruff, *The Confidentiality of Medical Quality Assurance Records*, Army Lawy. 5, 10 & n.53 (May 1987). The Government's assertion that the justiciability ruling below is correct cannot be reconciled with this statute.²

² Section 1102 was passed after Dr. Voge's decredentiaing, but is retroactive. Pub. L. No. 99-661, § 705(b), 100 Stat. 3904. Even if it were not retroactive, the legislation would still show

3. As to issue *b*, only a little needs to be added to what we stated in the Petition. As we explained, the Federal Circuit's myopic reading of the 1972 Tucker Act amendment would force litigants such as Dr. Voge to bifurcate their claims in precisely the manner Congress sought to avoid. We think that reading misconceives the Congressional purpose, and that the Court of Appeals had a duty under 28 U.S.C. § 1491(a)(2) (1982) to ensure that meaningful judicial review occurred on the merits of Dr. Voge's non-monetary issues because they arose from the same common nucleus of operative fact as her ASP claim. The Court of Appeals never performed that review because it embraced a mistaken view of justiciability. The remedy, in order to effectuate the goal of the 1972 amendment, is to remand to the Federal Circuit.

4. On the other hand, if our reading of the 1972 amendment is incorrect, and the Claims Court should not have addressed the merits of the nonmonetary relief Dr. Voge sought along with her ASP,³ then surely she is entitled to have the path cleared so she

Congress's expectation that credentialing disputes involving military personnel are a proper subject of judicial review. Such a Congressional judgment, if not dispositive, *Muskrat v. United States*, 219 U.S. 346 (1911); see P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 231-34 (3d ed. 1988), is certainly entitled to great deference, given Congress's responsibility to "raise and support Armies," "provide and maintain a Navy" and "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8. *E.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 64-69 (1981).

³ See *Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 2166, 2178 (1988) (disapproving of Federal Circuit's commenting on merits of case over which it lacked jurisdiction).

may litigate the loss of credentials and passover in a district court. Since, as we have explained, these claims are justiciable, that is the proper alternative forum, and the judgment below should be vacated with instructions to transfer to the District Court for the District of Columbia. 28 U.S.C. § 1631 (1982). Absent such a disposition, an action in the district court would likely be barred by the judgment below.⁴

Conclusion

The proper interpretation of the 1972 Tucker Act amendment is an important matter as to which plenary briefing and argument are appropriate under the usual standards.⁵ In any event, the correct disposition is not a denial of certiorari (as the Opposition suggests), but an order vacating with instructions to affirm the money judgment and transfer the remainder of the case. *E.g., Christianson v. Colt Industries Operating Corp., supra.*

⁴ Given the Government's failure to allay the concerns expressed in the Petition about the improper preclusive effect of the judgment (*see* Pet. at 17 n.3, 19), it is certain to resist district court litigation of the decredentiaing and passover unless this Court takes corrective action. In addition, footnote 4 of the Opposition contends (incorrectly) that the decredentiaing would be nonjusticiable in district court.

⁵ The Opposition notes the absence of conflict among the Circuits, but fails to respond to our observation (Pet. at 28) that such conflicts are impossible under the Tucker Act since all Tucker Act appeals go to the Federal Circuit.

Respectfully submitted,

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